IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Brabson *et al.*   Confirmation No.: 1822
Serial No.: 10/045,556   Group No.: 2152
Filed: January 11, 2002   Examiner: Dohm Chankong
For: DYNAMIC MODIFICATION OF APPLICATION BEHAVIOR IN RESPONSE TO
        CHANGING ENVIRONMENTAL CONDITIONS
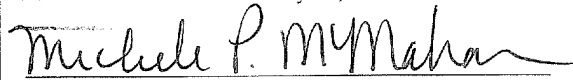
July 24, 2007

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CERTIFICATION OF TRANSMISSION
I hereby certify that this correspondence is being transmitted via the Office electronic filing system in accordance with § 1.6(a)(4) to the U.S. Patent and Trademark Office on July 24, 2007. *Michele P. McMahan* (signature) Michele P. McMahan

APPELLANTS' REPLY BRIEF ON APPEAL UNDER 37 C.F.R. §41.41

Sir:

This Reply Brief is filed in response to the Examiner's Answer mailed May 25, 2007.

It is not believed that an extension of time and/or additional fee(s) are required, beyond those that may otherwise be provided for in documents accompanying this paper. In the event, however, that an extension of time is necessary to allow consideration of this paper, such an extension is hereby petitioned for under 37 C.F.R. §1.136(a). Any additional fees believed to be due in connection with this paper may be charged to Deposit Account No. 09-0461.

II.   The Examiner's Answer – Response to Arguments

Appellants will refrain herein from readdressing all of the deficiencies with the pending rejections and, therefore, in the interest of brevity, Appellants hereby incorporate herein the arguments set out in Appellants' Brief on Appeal as if set forth in their entirety. Appellants believe that the Board may find this helpful in evaluating the propriety of the pending rejections.

A. Claims 1 and 23 are patentable over Buhrke

The Examiner's Answer argues that Appellants interpret the recitation "determining at a currently-executing application, based on the analysis, whether the currently executing application should modify the behavior of the currently-executing application" as requiring the step to occur entirely at the currently-executing application. (Examiner's Answer, page 10.) The Examiner's Answer appears to misstate the plain language of the recitation in an attempt to contort the recitation to fit the limitations of Buhrke. Appellants' argument is, in short, that Buhrke describes a negotiation between a terminal and a switch in contrast with a determination made within a currently-executing application regarding the behavior of the currently-executing application.

The Examiner's Answer further states that the claim recitations do not explicitly claim against interaction with another device as part of the determination process. (Examiner's Answer, page 11.) Appellants agree with the Examiner's Answer that interaction with another device is not expressly disclaimed. However, Appellants note that, absent a suggestion to the contrary, it is improper to construe a claim as including any limitation and/or element that is not expressly disclaimed. If this were the case, claims would be drafted in terms of what is not claimed instead of what is claimed. In this regard, Appellants point out that "determining at a currently-executing application..." appears to be unambiguous that the determination occurs at "a currently-executing application."

The Examiner's Answer states that the Buhrke's terminal application is analogous to Appellants' claimed currently-executing application and that the terminal application determines whether to modify its behavior based on analysis that occurs at the switch and, more specifically, that the terminal application determines, based on the switch's analysis, whether to modify (reduce) its bandwidth at the terminal application. (Examiner's Answer, page 11.) Appellants respectfully submit that, in contrast with the interpretation suggested in the Examiner's Answer, Buhrke describes that a request message is received in the network switch from the terminal, which determines if the request may be accepted. (Column 5 line 64 to column 6, line 2.) If the request is not accepted, then the switch may propose a reduced bandwidth, which the terminal may either accept or reject.

Moreover, in rejecting Claims 1 and 23, the Examiner's Answer states that Buhrke discloses "detecting a changed environmental condition (e.g. virtual channel request-col. 5 ll. 1-3, establishment of a virtual channel, col. 5 ll.34, rate of active cells-col. 5 ll. 35)." (Examiner's Answer, page 4.) Appellants respectfully submit that requesting a virtual channel is not synonymous with "detecting a changed environmental condition," as recited in Claim 1, for example. Appellants respectfully submit that requesting a virtual channel is typically responsive to a future occurring communication. Appellants respectfully submit that detecting a changed environmental condition constitutes detecting a past occurring condition, as indicated by the past tense of the term "changed." Even if "requesting" by a first device is taken to imply that a request is received by a second device, receiving a request is not tantamount to detecting either. Appellants thus submit that Buhrke does not disclose or suggest "detecting a changed environmental condition," as recited in the claims.

Further, the Examiner's Answer states that Buhrke discloses "generating notification of the detected condition (e.g. message with number of channels-col.5 ll. 11-12, load reduction request-col.5 ll.37, column 6 <<lines 21-26>>)." (Examiner's Answer, page 4.) Appellants submit that the cited portions of Buhrke appear to describe that in response to a request, the switch sends back the message with an accept/reject indication. See Buhrke col. 5, lines 10-13. Appellants submit that, in addition to not disclosing "generating a notification of the detected condition," as recited in the claims, the cited portions provide additional evidence that Buhrke is merely describing a negotiation between network components.

Moreover, even if a tenuous construction interprets the virtual channel request from a terminal as "detecting a changed environmental condition," no functioning construction of such a system would provide that a response to such a request would be considered as generating notification of the detected condition. For example, under the interpretation suggested in the Examiner's Answer, the terminal detects the condition and the switch generated notification of the condition. In this regard, why would the device interpreted as having detected **the condition** (the terminal) need to be notified of **the condition**. For at least these reasons, Appellants respectfully submit that Buhrke does not disclose or suggest the recitations of Claims 1 and/or 13.

Accordingly, as a finding of anticipation requires that there must be **no difference** between the claimed invention and the disclosure of the cited reference as viewed by one of ordinary skill in the art (*See Scripps Clinic & research Foundation v. Genentech Inc.*, 927 F.2d 1565, 1576, 18 U.S.P.Q2d 1001, 1010 (fed. Cir. 1991)), Appellants respectfully submit that Claims 1 and 23 are not anticipated by Buhrke for at least these additional reasons.

B.   Claim 1 is patentable over Yamato

The Examiner's Answer argues that Yamato's regulation unit is an application itself and meets the claim limitation "determining at a currently-executing application, based on the analysis, whether the currently-executing application should modify a behavior of the currently-executing application." (Examiner's Answer, page 12.) The Examiner's Answer further states that "the regulation unit clearly determines whether to modify various application monitoring parameters – the modification of these parameters results in a modification in the unit's monitoring behavior." (Examiner's Answer, page 12.) Even if the interpretation suggested properly construes the cell regulation unit as a currently-executing application, the cell regulation unit does not determine, based on the analysis, whether the cell regulation unit should modify a behavior of the cell regulation unit. Appellants submit that the Examiner's Answer improperly interprets the primary function of the regulation unit (monitoring and regulating) as a modification in behavior of the regulation unit. The cell regulation unit monitors and regulates traffic sent between applications. Since the behavior of the regulation unit is to monitor and regulate, any activity in connection with the monitoring and regulation functions is necessarily not modifying a behavior of the regulation unit, as suggested in the Examiner's Answer. In other words, monitoring and regulation do not constitute a modification in behavior. Thus, even if the regulation unit is construed as a currently-executing application, it does not read on the recitations of the claims.

Accordingly, as a finding of anticipation requires that there must be **no difference** between the claimed invention and the disclosure of the cited reference as viewed by one of ordinary skill in the art (*See Scripps Clinic & research Foundation v. Genentech Inc.*, 927 F.2d 1565, 1576, 18 U.S.P.Q2d 1001, 1010 (fed. Cir. 1991)), Appellants respectfully submit that Claim 1 is not anticipated by Yamato for at least these additional reasons.

C.   Claims 3 and 6 are patentable over Buhrke

The Examiner's Answer states that Buhrke discloses transmitting frames from the currently executing application and that each frame consists of a number of data cells, but the number of data cells for each frame is not fixed. (Examiner's Answer, page 13.) The Examiner's Answer additionally states that Buhrke further recites that to control congestion within the network, the number of cells transmitted from application is limited or reduced. (Examiner's Answer, page 13.) The Examiner's Answer then jumps to the conclusion that reducing the number of cells transmitted necessarily reduces the size of the frames. Appellants respectfully submit that this is an erroneous conclusion. For example, Buhrke does not suggest or disclose that the number of frames is not reduced commensurately with the number of cells. Thus, Burke does not disclose or suggest that the frame sizes are reduced. In this regard, there's no suggestion that "modifying comprises reducing a size of one or more data objects generated by the currently-executing application," as recited in Claim 3. Moreover, other than a brief explanation of transmission across broadband ISDN in the abstract and background of Buhrke, the term "frame" does not appear to be utilized in any context in the description of embodiments.
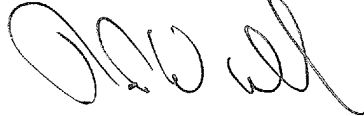
Appellants respectfully submit that Claim 6 includes recitations directed to increasing the size of data objects and that the rejection thus suffers from the same unwarranted logical leap regarding modifying frames. Thus, Burke does not disclose or suggest that the frame sizes are increased.

Accordingly, as a finding of anticipation requires that there must be **no difference** between the claimed invention and the disclosure of the cited reference as viewed by one of ordinary skill in the art (*See Scripps Clinic & research Foundation v. Genentech Inc.*, 927 F.2d 1565, 1576, 18 U.S.P.Q2d 1001, 1010 (fed. Cir. 1991)), Appellants respectfully submit that Claims 3 and 6 are not anticipated by Buhrke for at least these additional reasons.

III.   Conclusion

For the reasons set forth in above and in Appellants' Brief on Appeal, Appellants request reversal of the rejections of the claims, allowance of the claims and passing of the application to issue.

Respectfully submitted,

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